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POWER OF THE STATE TO FIX THE MINIMUM RATE OF WAGES TO BE PAID WORKMEN UNDER CONTRACTS OF PRIVATE EMPLOYMENT.

In a recent issue of the CENTRAL LAW JOURNAL (Vol. 55, p. 161), we commented adversly on the suggestion of a prominent jurist of Illinois, that, as a solution of the pending coal strike, the state had the right to fix the minimum amount of wages to be paid to coal miners. We based our objections to this suggestion on the hitherto undisputed rule that in a purely private business the compensation of employees cannot be regulated by the legislature without infringing on the constitutional liberty of either party to enter into any contract he pleases not violative of positive law or against public policy.

Our conclusions on this subject, however, have been exhaustively reviewed by one of the largest secular journals of the state of Illinois, in which the writer, by a very interesting course of reasoning, arrives at a conclusion quite opposite to our own. It is not our custom, however, to enter into a legal controversy with any but professional journals, but such a widespread error on such an important point of constitutional law cannot be too quickly corrected.

All arguments which attempt to sustain the right of the legislature to fix the minimum amount of wages to be paid workmen under contracts of private employment, rest fundamentally on the principle announced in the celebrated case of Munn v. Illinois, 94 U. S. 113, sustaining the right of the state to *regulate* the price of certain kinds of goods or services furnished to the public by corporations or persons controling a business of a *quasi*-public character. This case and the principle announced by it, while consistently sustained by the court which rendered it, has met with such strong condemnation and resistance as to be in no danger of being extended by implication outside of the limited boundaries in which it has already been confined by subsequent decisions. It does not mean that all contracts of a private nature can be interfered with arbitrarily, or that they shall be regulated in the interest of a small class of citizens, where the benefits to the public itself from such legislation are only remote and speculative. The only reason on which the Munn case rests is that the *public* will be directly benefited and saved from extortionate charges by regulating the rates for services which are peculiarly public in their nature and subject to exclusive control. Such legislation is in the interest of the whole public, and does not pretend to exist for the protection of the few, however necessary and worthy such protection may be. For the law to say that an employer shall not pay nor a laborer receive less than a certain amount for the latter's labor, could not possibly be for the interest or protection of the public generally, and is such a gross violation of the citizen's liberty of contract as not to be tolerated for a moment. The statement of the law on this question, as announced by Prof. Tiedeman in his late work on State and Federal Control of Persons and Property, is interesting. In section 99 he says as follows:

"No attempt has been made in any of the United States to stipulate or regulate the minimum wages in any private employment, and to prohibit any contract which provides for the payment of a smaller amount. But statutory provisions have been made in a number of the states, either by state statute or municipal ordinance, for the regulation of the rate of wages to be paid by the state or city to their employees, skilled or unskilled. So far as these regulations are only stipulations of the rate of wages which the government will pay to those who are thus employed by government officials, and prohibit those officials from changing by express contract the rate of wages, there is no room for any constitutional question. But if the regulation goes farther, and declares that the stipulated rate of wages of employees on government work shall not be lessened or increased by contract, whether the work is done under the supervision of government officials or is let to private contractors who employ and pay the workmen, the liberty of contract of the contractor is unquestionably infringed by such a regulation."

Thus the only apparent exception to the rule denying the right of the legislature to fix a mininum rate of wages, is in certain classes of

government work. But even this exception is being limited, Thus, a city ordinance, which provided that all specifications for public work shall require the contractor to pay all common laborers on such work not less than $1.50 per day, was held unconstitutional. State v. Norton, 5 Ohio N. P. 183. In cases of private employment, however, we have no doubt that every principle of constitutional law would sternly discountence any attempt on the part of the legislature to fix arbitrarily the maximum or the minumum amount of wages which an employer may pay to his employee, where both stand at arm's length and as free citizens under the law.

EVIDENCE—WHAT IS NECESSARY TO RENDER A DECLARATION ADMISSIBLE IN EVIDENCE.—It has been sometimes laid down in text-books of the law and in a few of the decided cases that a necessary requisite to render a declaration admissible in evidence was that they should be made *ante litem motam*. That this is not the law was held in the recent case of Halvorsen v. Lumber Co., 91 N. W. Rep. 28, where the Supreme Court of Minnesota held that declarations whether verbal or written, made by a deceased person, as to facts presumably within his knowledge, if relevant to the matter of inquiry, are admissible in evidence between third parties when it appears that: (a) The declarant is dead; (b) the declaration was against his pecuniary interest; (c) the declaration was of a fact in relation to a matter of which he was personally cognizant; (d) the declarant had no probable motive to falsify the fact declared.

On the point whether such declaration should be made *ante litem motam*, the court said: "Some of the adjudged cases contain statements, some of them *obiter*, to the effect that to entitle such declarations to be admitted in evidence it must appear that they were made before there was any controversy as to the matter to which they relate. Upon principle and authority it must be held, and we so hold, that the true test is not whether the declarations were made *ante litem motam*, but whether they were made under circumstances justifying the conclusion that there was no probable motive to falsify the facts declared."

SALE—WHEN A RECOVERY MAY BE HAD IN EQUITY OF PROPERTY SOLD, AFTER RESCISSION FOR FRAUD, INSTEAD OF IN A COMMON LAW PROCEEDING BY REPLEVIN.—In what form shall I bring my action, is a question very frequently asked by practicing attorneys. It may be said that the tendency of the law as to the proper form of an action is quite liberal, the purpose of the courts being to have the issues presented in a manner that is fair to both parties and that will reach the merits of the case.

A most common action is that for the recovery of personal property by the vendor after he has decided to rescind the slae because of the false representations of the buyer or for some other cause. Shall he proceed in equity to enforce a constructive trust or at common law by replevin? He may always appropriate the latter remedy, and the former, whenever the remedy by replevin is not an adequate one. This rule is well illustrated by the recent case of Missouri Broom Corn Co. v. Guymon, 115 Fed. Rep. 115. In this case the complainant proceeded by bill in equity and averred that a firm purchased broom corn in controversy with intent not to pay for the same, that the sale was induced by fraud, and that immediately after discovering the fraud he elected to rescind the sale and reclaim the property sold. The court held that the action must be considered as an action to recover personal property, and the buyer and his vendees with notice be treated as trustees for the complainant. The defendants in this case contended that the action should have been at law by replevin and not in equity. On this point, Thayer, J., speaking for the court says:

"Contention on the part of the appellants, which is entitled to more consideration, perhaps, than the one last mentioned, is that an action at law by way of replevin would have furnished an adequate remedy for the wrong complained of, since the property involved was personalty; and hence that a court of equity was without jurisdiction. With reference to this contention we observe that, while a vendor of personal property may maintain replevin against a vendee, who, as in this case, bought the property with a proconceived intent not to pay for the same (Bussing v. Rice, 2 Cush. 48; Bank v. Bates, 120 U. S. 556, 7 Sup. Ct. Rep. 679, 30 L. Ed. 754; Beebe v. Hatfield, 67 Mo. App. 609; Morrow Shoe Mfg. Co. v. New England Shoe Co., 6 C. C. A. 508, 57 Fed. Rep. 685), yet it does not follow that in every case a vendor who elects to rescind and reclaim his goods from one who has bought them not intending to pay therefor, must resort to replevin, and cannot have relief in equity. Serious obstacles may stand in the way of obtaining adequate redress at law. Besides, the fact that the fraudulent vendee, when the election to rescind is made, occupies the position of a trustee, should dispose a court of chancery to assume jurisdiction, on the ground of declaring and enforcing the trust, unless the transaction is a very simple one, which can be investigated readily by a court of law and tried to a jury. In the case before us the bill alleged that such part of the broom corn as had not been worked up into brooms had been mingled by the broom company with other broom corn, which, as a matter of course, rendered it difficult of identification. It was also disclosed by the bill that the property had been twice sold, and that the rights of the alleged purchasers would be a subject-matter for careful investigation. It was also charged in the bill that a part of the commodity had been manufactured into brooms, and consigned to third persons, who were acting in collu-

sion with the broom company, and who were chargeable, as fraudulent trustees, with the property, or the proceeds thereof, which they had received. It was obvious, therefore, that the complainant could not obtain complete relief by a single action in replevin, such as he could obtain by the more flexible processes of a court of equity. These considerations were ample, in our judgment, to warrant a court of equity in entertaining the bill for the purpose of investigating the entire transaction, and enabling the complainant to obtain full relief by a single action. The case was one which fell within the province of a court of chancery, because the object was to establish and enforce a trust, and because the legal remedy was inadequate. Refining Co. v. Fancher, 145 N. Y. 552, 556, 557, 40 N. E. Rep. 206, 27 L. R. A. 757. See, also, Morse v. Nicholson, 55 N. J. Eq. 705, 38 Atl. Rep. 178."

CERTIFICATES OF STOCK AND HEREIN OF THE RELATIVE RIGHTS OF AN ATTACHMENT CREDITOR AND A PRIOR UNRECORDED TRANSFEREE.

It is proposed in this paper to discuss the relative rights of a creditor who has, in accordance with the provisions, attached the stock of his debtor upon the books of the corporation; as against the rights of a prior purchaser of the stock who has failed to obtain a transfer upon the books. This has been spoken of as the most vexed question in the most vexed branch of the law, and probably no one who has attempted to satisfy himself as to what the law is on the subject, will feel disposed to deny the truth of the assertion. Before approaching the question proper it is proposed to premise briefly the well-settled principles as to the nature and attributes of a share of stock and of the certificate which represents it.

As regards the rights accruing from the ownership of stock, the corporation may well be considered to be "an artificial being, invisible, intangible, and existing only in contemplation of law."[1] For the phase of the subject with which this article attempts to deal, this famous definition of Chief Justice Marshall's in the Dartmouth College Case, may be assumed to be accurate and all-inclusive. That it submerges in the legal fiction of an artificial, corpora e existence the real nature of its inherent dual entity does not destroy its value for our purpose, for the relations of the stockholder with the corporation are the relations of two individuals dealing at arms length. The stockholder often does not know and has no means of knowing who the other stockholders are—as in the case of an equitable assignment unrecorded on the books. His legal rights exist and are enforcible against the corporation itself. He simply holds title, evidenced by his certificate of stock, to an unascertained share of the corporate assets and has certain rights, fixed by law or by the rules adopted by the stockholders, in the management of the corporation and of participation in the profits of the enterprise.[2]

What then is the nature of this evidence of title; what are the attributes of a stock-certificate? Mr. Cook defines it as "a written acknowledgment by the corporation of the interest of the shareholder in the corporate property and franchises."[3] It is a certificate evidencing that the person named therein is possessed of certain rights and is subject to certain duties as against the corporation. "It is the sum of all the rights and duties of the shareholders."[4] With it, is usually combined a blank power of attorney authorizing him who is named therein to obtain a transfer upon the books. But it is not the stock itself. On this point the majority of the authorities seem to be agreed.[5]

As for the shares of stock, of which the certificates are evidence, it is well settled that they are personal property,[6] even as to the realty which forms part of the corporate assets. Formerly they were held to be realty

[1] 4 Wheat. 518, 636.

[2] We must not lose sight of the fact, however, that while courts of law seldom look beyond the fiction of corporate entity, there is in truth, another side to corporate existence not embraced in this dogma. There exists there a collection of individual shareholders, and for various equitable purposes the corporation must be considered as a number of individuals standing in a contractual relation to one another—as a partnership is always regarded — rather than a separate "artificial being existing only in contemplation of law." Viz. Des Moines Gas Co. v. West, 50 Iowa, 16, 25. Perhaps for accuracy the later definition of the Supreme Court of the United States is preferable, viz., "Private corporations are but associations of individuals united for some common purpose and permitted by law to use a common name, and to change its members without a dissolution of the association." United States v. Trinidad Coal Co., 137 U. S. 160.

[3] Cook on Corp. sec. 13.

[4] Lowell, Transfers of Stock, sec. 4.

[5] Clark & Marshall on Corp. vol. 2, 378*a*; Morawetz on Corp. sec. 193.

[6] Allen v. Pegram, 16 Iowa, 163, and cases cited therein.

when the corporate property consisted solely of land.[7] But this view is to-day entirely abandoned, and in every case they are regarded as personalty. Are they, then, "goods, wares and merchandise" within the meaning of the seventeenth section of the statute of frauds? In England, they are held not to be, but most of the American states hold that they are.[8] It seems extremely illogical to hold that shares of stock are at once "goods, wares and merchandise," and choses in action. That they are classed with the latter is firmly settled in our law by the great weight of authority (*post*). How then can they consistently be classed with the corporeal movable property to which the statute of frauds is supposed to apply? There is no other species of incorporeal rights which the statute is claimed to cover. It is said that a fair construction of the word "goods" is to limit it "to such personal property other than wares and merchandise, as are usually transferred by sale and delivery."[9] Surely shares of stock are not by fair construction to be classed with "wares and merchandise," and neither can they be said to be "transferred by sale and delivery," and yet the majority of the adjudicated cases on this point hold that they are within the statute. Missouri holds this way,[10] and the rule would seem to be firmly established in this country, but as we have said above, it is illogical and contrary to good reason. It is but one of the many illustrations to be found in discussing this subject, of the necessity which courts have felt of allowing reason and logic to be swept aside by the demands of modern commercial conditions. As a Maine court bluntly said, "Joint companies have become so numerous and so large an amount of the property of the community is now invested in them, and as the original *indicia* of property arising from delivery and possession cannot take place, and as contracts for the sale of such stocks is clearly within the mischief which the statute was designed to prevent, they ought to be held within its letter and spirit."[11]

We have said that stock certificates are the evidences of choses in action. This view is firmly established in our law. It is taken by Morawetz[12] and by Thompson,[13] and has been followed in the vast majority of leading cases.[14] It is the established rule in Missouri.[15] But nevertheless the statement is far from accurate. To be sure they possess many of the attributes of choses in action. Thus shares are not subject to actual delivery and are not subject to seizure upon execution at law or attachment save by statutory provision. But there is an important difference. The possessor of stock is an owner in the corporate property to the extent that the certificate indicates, and in no sense can he be said to be a creditor of the corporation of whose debt the certificate is evidence. As the court said in a well considered case in Tennessee—"We think that shares of stock are not simply and purely choses in action in the sense that open accounts are held to be. There is no debtor as in the case of open accounts, but the shares simply represent the interest of the stockholder in the corporation, and the certificates are the mere *indicia* of the interest of the stockholder."[16] It is useless to say that they are choses in action because they are the measure of the owner's rights against the corporation. A cause of action only arises to the stockholder for an infringement of those rights and it would as well arise for an injury to a chose in possession. The true chose in action is that species of chattel personal where a person has the right of property, but not of occupancy, and possession is recoverable in an action at law. This is the definition as laid down by Blackstone, and which, it is believed, has never been disputed. It is evident that to the stockholder lies no action at law to recover possession of his *pro rata* share of the corporate assets. His interest "is equitable and does not give him the rights of ownership to specific property of the corporation. But he does own the specific

[7] Thus Prof. Greenleaf in his edition of Cruise on Real Property, 39, 40 says: "Shares in the property of a corporation are real or personal according to the nature, object and manner of the investment. Where the corporate powers are to be exercised solely in land—the shares are deemed real property." There are many old decisions in this country to the same effect.

[8] North v. Forest, 15 Conn. 400; Benjamin on Sales, book 1, part 2, 126 and note.

[9] Walker v. Supple, 54 Ga. 178.

[10] Fine v. Hornsby, 2 Mo. App. 61; Bernhardt v. Walls, 29 Mo. App. 210.

[11] Pray v. Mitchell, 60 Me. 430.

[12] Vol. 1, sec. 193.

[13] Vol. 1, sec. 460.

[14] Bank v. Smith, 65 Ill. 44.

[15] Vonstone v. Goodwin, 42 Mo. App. 39.

[16] Cates v. Baxter, 97 Tenn. 443, 446.

stock held in his name, and under the rules of law the property of the corporation is held by the corporation in trust for the stockholder. It will be readily seen that a share of stock is a thing owned by the stockholder. It is in no sense a debt owing to the stockholder."[17]

Thus, again in this respect, we find that shares of stock are in truth *sui generis*. They are like to choses in action, yet unlike. They have come to be classed with them because they resemble them more than they do coporeal personal property. From the very nature of corporate existence they cannot be the latter.[18] It was from their similarity to choses in action that at common law they could not be reached on execution, and to-day where the remedy exists it is derived from statutory enactment.[19]

It is undeniably the tendency of the law to afford the greatest possible facility to transfers of stocks. The complex business requirements of to-day, and the immense transactions done in stock certificates, demand it. But what degree of negotiability can be granted to this instrument? Obviously, a stock certificate is foreign to the negotiable instruments of the law merchant which would require a transfer to carry with it a clear title, a full measure, and would forbid inquiry into the consideration. The inherent characteristics of a certificate of stock differentiate it to a marked degree from recognized negotiable paper. As has been stated, a stock certificate is simply a blank power of attorney to demand a transfer on the books of a corporation of the vendor's rights against the corporation as evidenced by the certificate. Plainly this is far from being a negotiable instrument in the usual acceptance of the term. "Certificates of stock are not securities for money in any sense, much less are they negotiable securities," was the emphatic declaration of a New York court;[20] or as was said with equal emphasis in Indiana, "the difference between a promissory note and a certificate of stock is so wide and marked, that a rule of law governing the transfer of the former is by no means applicable to the latter."[21] Nevertheless it has long been the tendency to attribute to such securities a character approximating to negotiable instruments proper, although in no sense can they be logically held to possess the attributes of negotiability.[22] Here again we find this ever reoccurring conflict between reason and practice in the interpretation of this peculiar instrument. They are usually said to be "*quasi*-negotiable." Mr. Daniels defines *quasi*-negotiable instruments as those which "while not negotiable in the sense of the law merchant, are yet so framed and so dealt with, as frequently to convey as good a title to the transferee as though they were negotiable,"[23] which is but little better than saying that such instruments are denied negotiability by the uncompromising logic of the law only to receive it from the usages and needs of trade. In some jurisdictions—notably in New York—the doctrine has been carried to such an extent that a delivery of the stock certificate endorsed in blank but unrecorded on the books of the corporation is held to pass the legal as well as the equitable title to the stock.[24] In other words they are credited with the highest degree of negotiability. In general, however, the courts have balked at so radical a step and refused to allow to the unrecorded

[17] Bridgman v. City of Keokuk, 72 Iowa, 42.

[18] As it was well expressed by the court in Slaymaker v. Gettysburg Bank, 10 Barb. 373: "The certificate is merely the evidence of his (the owner's) interest, as title deeds are of title to land, but not of the possession. The stock cannot be considered in the light of a thing in possession and personal estate, as distinguished from a chose in action."

[19] Green v. Keene, 14 R. I. 396. It is interesting to note the reason why statutory provision is necessary to make shares of stock liable to execution. At early common law all forms of property were gotten at to answer to their owner's debts. That in possession was taken by execution, but that which was not in possession, as shares of stock and choses in action, was reached by proceeding against the person of the debtor and imprisoning him until he should satisfy the judgment. Then as legislation gradually curtailed this right of coercion—finally abolishing it—it became necessary to provide means to reach such property on execution. It is believed that every state in the union has provided for attachment and levy of execution on stock on the transfer books of the corporation.

[20] Bank v. N. Y. & N. H. R. R., 13 N. Y. 627.

[21] Meyer v. Second Nat. Bank, 57 Ind. 208.

[22] This view is substantiated by numerous well considered decisions. It has been asserted by the federal courts several times. In Scott v. Nat. Bank, 15 Fed. Rep. 501, Shipman, J., clearly expressed it: "The tendency of modern decisions is to regard certificates of stock attached to an execution, blank assignment and power to transfer, as approximating to negotiable securities, though neither in form nor character negotiable."

[23] Daniels on Negotiable Instruments, vol. 2, sec. 1708.

[24] McNeil v. Tenth Nat. Bank, 46 N. Y. 325.

transferee priority over the title of the real owner from whom the certificate had been stolen or exemption against the countervailing equities which might be set up against the stock, and it must be acknowledged that the New York courts have gone very far in the realm of judge-made law. Of course, the transferee who has obtained a transfer upon the books has the legal title. But until he has done so—and the requirement is now universal—it would certainly seem that his is only an equitable title.

For the Attaching Creditor. — Having thus briefly touched upon some of the most important characteristics of stock certificates, let us examine the principal arguments that are made in behalf of an attaching creditor as against the claims of a prior unrecorded transferee. The most important reason advanced is that a contrary rule will open the door to unlimited fraud. In a sale of personal property, the vendee must take care to clothe himself with the *indicia* of ownership. The delivery of the property, the taking possession thereof by the purchaser, is an obligation laid down by sound principles of law. One who neglects to so fortify his position is universally postponed to a subsequent *bona fide* purchaser. His neglect is held to raise a presumption of fraud. Now the possession of the certificate of stock, it is claimed, is not such possession as to satisfy the law. A certificate of stock, as has been seen above, is far from possessing in reason the attributes of negotiability that will make the vendee absolutely secure in his possession. It is a generally accepted fact, for example, that had a prior vendee been recognized as owner on the books of the corporation, the equitable title given to the second vendee by a delivery to him of the certificate would not avail him. In other words the delivery is made upon the books of the corporation and not by the act of changing possession of the certificate of shares.[25] If then the vendee fails to avail himself of the proper and reasonable means of assuming possession, does not his neglect evidence fraud? "If a man neglects to do what is necessary for his protection, or what he is expected to do under the circumstances, the presumption fairly arises that his omission is fraudulent in fact; if the effect of such neglect is to injure others, it is fraudulent in law."[26] If this reasoning holds as against a purchaser, is it any less cogent as against an attaching creditor? We are arguing here from the principles of common law aside from any statutory enactments on the subject.[27] As observed by Mr. Lionberger in the article just quoted, "why should not the creditor of the stockholder of record receive the same protection? The same presumption of fraud arises, the same opportunity of fraud exists. A man indebted, wishing to avoid payment, can readily transfer his certificate and thereby avoid responsibility. Nothing could be easier. * * * If the certificates are made negotiable or even *quasi*-negotiable, the enormous property represented by these instruments is practically placed beyond the reach of creditors."

A close examination of the immense number of cases upholding the rights of the attaching creditor convince us that this is the back-bone of the contention, viz., that there is no such delivery to an equitable transferee as will satisfy the objection of the law to secret liens. Those upholding this view rely in general upon the following points. (The citations below are purposely few in number and only such as best substantiate the assertions.)

(1.) That stock is personal property.

[25] This principle was laid down in 1865 in the very important case of N. Y. & N. H. R. R. v. Schuyler, 34 N. Y. 30, 79, decided by Davis, J., in an exhaustive decision which has been recognized ever since as one of the land marks in this branch of the law, and which has never been overthrown.

[26] 7 Cent. Law Journal, where this objection to recognizing the equitable transfer as against the attachment creditor is well shown in an able argument by Isaac Lionberger of the St. Louis bar. The subject is further exhaustively treated by I. H. Hatfield, 30 Am. Law Rev. He says: "The whole spirit of our law is toward discouraging secret transfers and secret liens, and to hold that a secret transfer of a piece of paper known only to the immediate parties, made without witnesses, and as easily made after attachment as before, is valid, is to render that equitable principle of no effect or open the door to unlimited fraud."

[27] The Statute of 27 Elizabeth, ch. 4, for the protection of subsequent purchasers did not apply to personal chattels, but as it was in affirmance of the principles of common law (Bispham, Eq. sec. 252), any sale of such chattels without delivery of possession has always been held void as to subsequent purchasers. Twyne's Case, 1 Smith's Lead. Cases, 33; Lickbarrow v. Mason, 1 Smith's Lead. Cases, 1147. The statute of 13 Elizabeth for the protection of creditors applies to realty and personalty alike. The statute of Missouri expressly declares that any sale of goods and chattels without delivery of possession shall be declared fraudulent and void as against the creditors of the vendor or subsequent purchasers alike. Rev. Stat. Mo. 1899, sec. 3410.

Cook on Corp. 12.
3 Parsons on Cont. 34.
Tibbets v. Walker, 4 Mass. 595.

(2.) That possession is not taken by a delivery of the certificate.

1 Stacy, Eq. Jur. 421.
People's Bank v. Gridley, 91 Ill. 466.
Fisher v. President and Directors Essex Bank, 1 Am. Ry. Cas. 127.

(3.) That where a general statute requires transfers to be made on the books of the corporation or the charter of the corporation so requires, no transfer except it be so made will convey title to the stock as against third persons.

N. Y. R. R. v. Schuyler, 38 Barb. 440.
Skowhegan Bank v. Cutter, 49 Me. 317.
Fisher v. Jones, 82 Ala. 117.

And further where the charter gives to the corporation the power to regulate by a by-law and a by-law requires them to be evidenced on the books; such by-law is reasonable and valid and binding on all third persons.

Oxford Turnpike v. Bunnell, 6 Conn. 558.
Chouteau Spring Co. v. Harris, 20 Mo. 383.

If there be no such requirement any where expressed it seems that he who is first in time will take.

Favoring the prior execution purchaser:
Naglee v. Pac. Wharf Co., 20 Cal. 529.

Favoring the prior equitable transferee:
Boston Music Hall Assn. v. Cory, 129 Mass. 435.

(4.) That the transfer of personalty unaccompanied by delivery of possession is fraudulent and void as against creditors of the assignor.

Twyne's Case, 1 Sm. Lead. Case 33.

(5.) That an assignment without obtaining a transfer on the books evidences a secret trust and fraud.

30 Am. L. Rev. 231.
Colt v. Ives, 31 Conn. 25.
Pinkerton v. Man. R. R., 42 N. H. 424.

(6.) That an execution creditor stands in the same position in this respect and has the same rights as a purchaser for value.

Massey v. Wescott, 40 Ill. 163.

(7.) That certificates are not negotiable paper but are simply a power of attorney to obtain a transfer on the books, *i. e.*, to take possession of the property.

Bank v. N. Y. & N. H. R. R., 12 N. Y. 627.
Meyer v. Second National Bank, 57 Ind. 208.

For the Equitable Transferee.—Let us now briefly consider the argument in favor of the unrecorded transferee. Of the text-writers who support this view (as most of them do), Morawetz is the most emphatic in his statements. He says: "It has sometimes been argued that an assignment without the proper entry on the books is evidence of a secret trust, and, if unexplained, is to be deemed fraudulent and void as against creditors of the assignor; like an assignment of personal property without delivery of possession." "This argument," he concisely adds, "shows a singular ignorance of the true state of affairs."[28] As we have seen that this argument is the foundation of the alleged rights of the execution creditor, let us develop the reasoning which led to such an emphatic statement by one of our foremost text-writers. He admits that shares in a corporation are not tangible property but are rather contract rights or choses in action. But while admitting that the certificates, from their origin, are merely evidences of the holder's rights, he states that they are "in reality something more. They are treated in many respects as if they were the shares themselves, and when passed from hand to hand are considered as passing to the assignee, all the equitable rights of the holder and a legal right against the corporation to be admitted as a shareholder on the books. The certificates then have a value in themselves, and may rightly be considered property. They are similar in this respect to negotiable paper. The debt of the maker of a note is a mere chose in action, but the note itself may properly be treated as a chattel. So shares in a corporation are mere choses in action, while the certificates are treated as the embodiment of these rights, and may be considered as chattels."[29] From this he argues that the delivery of the certificate is as operative as the delivery of any personalty. In other words, that the delivery of the evidence of title passes the property and not the transfer on the books. He then goes on to show that an execution creditor does not occupy the position of a *bona fide* purchaser for value (although if his position so far be tenable, it would seem to be unnecessary to prove this, as the delivery of chattels will surely defeat the title of any subsequent *bona fide* purchaser), and that he steps into the shoes of his debtor, taking such rights as were in him as of the day the execution was levied. These rights, he adds, the vendor has practically divested him-

[28] Morawetz on Corp. vol. 1, sec. 198.
[29] Morawetz on Corp vol. 1, sec. 193.

self of. He holds that the transfer on the books "is required merely to perfect the strictly legal title as against the corporation."

The points then and the principal authorities relied on, to prove the superior rights of the equitable transferee may be summed up as follows:

(1.) That stock certificates possess a certain degree of negotiability which makes them "nearly as negotiable as commercial paper."

Bank v. N. Y. R. R., 13 N. Y. 599.

(2.) That the assignment of the certificate ought therefore to have the same effect as to the creditors of assignor, as the indorsement and delivery of a bill or note.

Morawetz, vol. 1, sec. 193.
Scott v. Pequonnock Nat. Bank, 15 Fed. Rep. 500.
Walker v. Detroit R. R., 47 Mich. 338.

(3.) That the attachment creditor can get no better title than his debtor had, and since all of his interest passed by the assignment, there is nothing left in him on which an attachment can be levied.

Reed's Appeal, 1 Harris, 478.
Ludwig v. Highley, 5 Barr. 132.

(4.) That an attaching creditor is not in the position of a *bona fide* purchaser for value.

1 Morawetz, sec. 195.
Hart v. Farmer's, etc. Bank, 33 Vt. 252.
Morris v. Ziegler, 71 Pa. St. 453.

(5.) That an unrecorded transfer is not evidence of a secret trust because possession of the certificate confers apparent ownership, and the stock books of a corporation are for the benefit of the corporation only, and are not a public record nor are they open to public inspection.

Merchants' Bank v. Richards, 6 Mo. App. 463.
Thurber v. Crump, 86 Ky. 419.
Chouteau Spring Co. v. Harris, 20 Mo. 382.
Robinson v. Nat. Bank, 95 N. Y. 642.

(6.) That it would unduly restrict the business of the world.

Broadway Bank v. McElrath, 13 N. J. Eq. 28.

In Conclusion.—Such it is believed will be found to be the principal arguments on both sides of this question. It remains for us to see what conclusion can be drawn from them. *Imprimis*, it should be stated that while no distinction has been made in what has been said hitherto between the relative positions of an equitable transferee and a prior attachment creditor, and an equitable transferee and subsequent attachment creditor, it is be-

that the postponement of an equitable transferee to a prior attachment creditor is not and never has been questioned.[30] The difficulty arises where the attachment was subsequent to the unrecorded transfer. What then is the position of an attachment creditor who, without notice, levies on his debtor's stock at a point in time subsequent to the transfer of the certificate to an unrecorded vendee? The text-writers, with the possible exception of Mr. Spelling,[31] are practically unanimous in postponing such creditor to the equitable transferee. As for the judicial decisions, they are numerous on both sides, but the claim made by Mr. Cook,[32] that the majority favor the equitable transferee is far from being correct. In fact the number of jurisdictions that have preferred the attachment creditor are far in excess of those which have taken the opposite view.[33] And it would seem that the arguments advanced in support of the rights of the attachment creditor are the most consonant with the reason and the logic of the law. A careful examination of the points, *supra*, embodied in these arguments appeal to one with almost irresistible force. It is undeniably true that the postponement of the attaching creditor opens the door to fraud. It is evident that if the secret transfer of a stock certificate, which can be made as easily after levy of the execution as before, is held not to be evidence of fraud, then at once immunity is granted to all the enormous wealth invested in this class of securities as against the claims of creditors. It is undeniably true (despite the clever arguments to the contrary), that the delivery of the certificate is not

[30] Ky. Nat. Bank v. Avery, 30 Am. Law Rev. 234.
[31] Spelling on Corp. vol. 1, sec. 510.
[32] Cook on Corp. ch. XXII., sec. 381.
[33] It is not purposed here to collate the decisions. Suffice it to say that the states with the largest corporate interests will be generally found to incline toward the equitable transferee, while the extreme eastern and extreme western states hold in general for the assignment creditor. New York and Pennsylvania are both firmly bound to the former class, although the earlier decisions in New York show considerable conflict. In the federal courts also will be found a conflict of opinion, although the trend is in general for the equitable transferee. It is probable that, leaving out the statutes which have been passed by several states to protect the equitable transferee, only about one-third of the state courts are on record to the same effect. The decisions are extensively collected in 30 Am. Law Rev. 228; Cook on Corps. ch. XXVII., 487; Spelling on Corp. 510, note; Thompson on Corps. 2409, and in the Am. and Eng. Digest.

delivery of possession. The universal requirement, that transfers of stock are to be made only upon the books of the corporation, means that then only does the vendee acquire possession, or else it means nothing. Both by the principles of common law and by statutory requirements, the purchaser of personalty (and stock is admitted to be personalty), must clothe himself with the *indicia* of ownership. The purchaser of a horse who allows the animal to remain in the hands of the vendor, cannot set up his title as against either a subsequent purchaser or an execution creditor. Now when the statutes of Missouri declared stock to be personalty[34] it was not the certificate that was meant; it was the interest each stockholder had in the corporate property. The certificate as has been stated, is only an evidence of ownership, a tangible indication of intangible property. A stockholder is such without a certificate. He can always transfer his interest, although the corporation has issued no certificates, and would his written order to the corporation, never presented to it, to transfer his interest to his vendee, defeat an attachment creditor?

There are, however, two arguments as against the attaching creditor's rights that are of much importance. These are that the transfer books of a corporation are not a public record, and that an attachment creditor is not in the position of a purchaser for value. As to the first, the assertion is evidently true, but those who have relied on it have erred in supposing that the recording of a sale of stock is in all points similar to the recording of a deed. The former is required by the charter for the protection of the corporation only. The latter is required by law for the protection of third parties. The former is only important as showing that in the contemplation of the original parties, the interest of the stockholder is not considered to have passed until the novation is reported to and recorded by the corporation. Then is the instant of time when the vendor is divested of his possession. And it is submitted that in the logic of things, until he is so divested of possession, the equitable title of his secret transferee cannot be set up against *bona fide* purchasers or creditors. That the law does not require the transfer books to be open to public inspection, as is the case or the records of deeds, is not pertinent. It is perhaps to be regretted that it does not, in order that this class of securities should be subjected as fully as possible to the just claims of creditors. But neither does the law require that the purchaser of a horse should hitch it in front of his house that all the world should have notice. The question is one of possession, not of notoriety. When the vendor's creditor levies on execution against that horse, the possession or lack of possession of said vendor is conclusive. So when the creditor of a stockholder levies on the stock on the books of the corporation, as the law directs, the possession of his debtor as evidenced by the books should be conclusive.

The second argument, viz., that an attaching creditor is not a purchaser for value, is better founded. "If anything is settled by reason and authority it is that a judgment creditor is not entitled to the protection of a purchaser of the legal title as against an equitable owner," was the emphatic declaration in a leading case.[35] It must be admitted that this is true as a broad proposition of law. Yet if it be once granted that the purchaser does not take possession of the stock until the transfer be made on the books, then the attaching creditor is amply protected in all those states which have a statute similar to that of Missouri,[36] which, in support of the statute against frauds on creditors and purchasers provides in substance that any sale of personalty, unaccompanied by change of possession, shall be deemed fraudulent and void as against both creditors and subsequent purchasers. It has been stated, *supra*, that the laws of Missouri expressly declare stock to be personalty. And indeed it is hard to see why one who advances credit to another, relying on the knowledge of his debtor's stock holdings, should not be ranked *pari passu* with a purchaser for value of the legal title as against one who has neglected to take possession. Is it just that one who stands upon the books as owner, who votes the stock, and who receives the dividends, should, when proceeded against for advances made on the strength of such stock, show that he had

[34] Rev. Stat. Mo. 965: "The stock of every company formed under this article shall be deemed personal estate and shall be transferable in the manner prescribed by the by-laws of the company."

[35] Reed's Appeal, 1 Harris, 478.

[36] Rev. Stat. Mo. 1899, 3410.

transferred the certificate long before—perhaps only purchasing the stock in order to be recognized as owner, thus obtaining a fictitious credit, and transferring it immediately to one who has agreed not to obtain a transfer on the books? Surely here is protection to fraud which is foreign to the spirit of our laws.

It will be noticed that the first three points made for the equitable transferee, *supra*, depend entirely upon the negotiability of the certificate. Thus, Mr. Morawetz places them on an equality with promissory notes, and says that delivery of the certificate is delivery of possession. It is submitted that in accordance with the arguments herein adduced, his assumption is erroneous.[37] There is no such similarity between the two instruments as will justify the assertion. If this be true, we must of necessity admit that up to this point there has been advanced no reason for preferring the equitable transferee to the attaching creditor. Such a position is directly at variance with the reason and logic which Mr. Bishop has said, will ever be found underlying every rule of law.

There remains, however, to be considered the last point that is made in behalf of the equitable transferee. It is one of vast importance. It is one that will overthrow in time the whole frame work of argument which we have reared. It is that the preference of the attaching creditor would unduly restrict the business of the whole world. This is the lever that has moved the courts to an illogical conclusion, and it is the reason which will induce in time, the rights of the equitable transferee to be protected in every court as against an attaching creditor. It is the argument that appeals to the states of commercial prominence, and that induced New York and Pennsylvania to take the lead in the list of those holding this view. It was the argument that induced Illinois, Maine, Virginia, West Virginia, Massachusetts, Rhode Island, New Hampshire and Wisconsin to enact statutes declaring that the unregistered transferee shall have priority. We are brought face to face, under modern commercial conditions, with a state of affairs neither in existence nor in contemplation at the time when the principles which govern the negotiability of instruments, and the distinctions between choses in action and chattels in possession, were established. The wealth of the nation is to-day centered in corporate activity. Day by day these immense combinations of capital appear and increase and expand with almost incomprehensible rapidity. The prosperity of our country and the extent of national resources, proves the necessity of such combinations. The immensity of the interests involved forces upon us the necessity of affording to them the utmost protection. The facility of transfers of shares in corporations must be safe-guarded. To hold that every purchaser of certificates of stock must obtain a transfer on the books of the corporation in order to be protected against his vendor's creditors is, under modern conditions, rank absurdity. On the floor of every stock exchange shares change hands daily and hourly in amounts that would have staggered belief a half century ago. On these shares, evidenced solely by these certificates, banks advance enormous sums of money. These interests must be protected. It is useless to say, as do Mr. Lionberger and Mr. Hatfield, *supra*, that the requirement of obtaining a transfer is not objectionable to the investor but only to the speculator and stock-jobber. This is not true. Investors themselves are unable to comply with these requirements. How can a purchaser on the New York Exchange, of shares in a California corporation, obtain a transfer on the books when the exigences of business may

[37] He likens a stock certificate to a promissory note, calling attention to the fact that the debt of the maker of the note is a chose in action, but the note is a chattel This decision was reached by Lord Ellenborough in King's Bench, Neilage v. Halloway, Barn. & All. Rep. 318. But it was also decided by the House of Lords that stock certificates are not negotiable paper and cannot be taxed as goods and chattels. David Wells on Taxation 486, note. Both of these decisions are upheld in England to-day, and both are logical. The note is the sole evidence of the debt, nothing tangible exists aside from it. The certificate is only evidence of a right to be put into possession of tangible property as far as is compatible with corporate existence, viz., by a transfer on the books. Herein lies the difference between the two instruments. The delivery of the certificate is not a delivery of the possession, that is accomplished only by transfer on the books in accordance with the universal requirement.

He further says that a certificate can be regarded as the property itself, because it has the valuable attribute that its holder can by legal right demand to be admitted on the books. In other words, because it is the evidence of his right to take possession, it is the property itself. Is then, an order from A to his servant to deliver to the bearer a certain chattel, the chattel itself? Would the title of the holder of the order be good as against an attaching creditor? Are not the two situations identical?

force him to sell the stock at any moment? Nor indeed, can the interests of speculative purchasers themselves be thus lightly swept aside. Speculation is a logical and legitimate outgrowth of modern business methods. However reprehensible it may be thought from an ethical standpoint, it is nevertheless legitimate. The law has ever yielded to the customs of merchants and the usages of trade, and in this instance the logic of the law must bend to the demands of business. The sooner the legislatures of the several states enact statutes to protect the equitable transferee, the sooner will a certain and uniform rule take the place of the present uncertainty. The end is inevitable.

L. L. LEONARD.

St. Louis, Mo.

CONSTITUTIONAL LAW—STATE AID FOR OR CONTROL OF INTERNAL IMPROVEMENTS.

STATE v. FROEHLICH.

Supreme Court of Wisconsin, May 19, 1902.

1. Laws 1901, ch. 282, appropriating from the general fund an amount not exceeding $20,000 for the constructing and strengthening of the levee system on the Wisconsin river, is unconstitutional, as contravening Const. art. 8, § 10, providing that the state shall not contract "any debt for works of internal improvement or be a party in carrying on such works;" a levee or dike to restrain the waters of a navigable river being a work of internal improvement.

2. The fact that the construction of a levee might incidentally avert possible peril to life does not make it other than a work of internal improvement; nor is the declaration of such purpose in the title of the act, authorizing such construction, more effective to that end.

STATEMENT OF FACTS: By chapter 282 of the Laws of 1901 there was appropriated from the general fund an amount not exceeding $20,000, "for the purpose of constructing and strengthening the levee system already existing in the vicinity of Portage on the Wisconsin river in Columbia and Sauk counties, Wisconsin." A commission appointed by the governor was created to have charge of such work, "in such manner as, in their judgment, will best protect said city and vicinity from the overflow of the Wisconsin river." Said commission was to audit and certify the bills thereof, which were to be paid on the approval of the governor. The municipalities in which situated were required to procure the necessary right of way without expense to the state. The commission, having been appointed, incurred a certain bill for surveying, duly audited and certified the same, and it was approved by the governor. The secretary of state, however, refused to draw and issue warrants on the sole ground that the legislation is void, whereupon the commissioners, as relators, brought *mandamus* proceedings to coerce the issue of such warrants.

DODGE, J. (after stating the facts): This case presents for consideration and decision, not the inherent limits of the general power of appropriation of public moneys conferred upon the legislature in the grant of the legislative power, nor, the inherent limits of the general power to provide for good government of the state, for the protection of the "lives, limbs, health, comfort, good order, morals, peace, and safety of society" (State v. Heinemann, 80 Wis. 253, 49 N. W. Rep. 818, 27 Am. St. Rep. 34), called the "police power," but, instead, presents the question whether, waiving discussion of the extent of such powers as a general proposition, the legislature is expressly forbidden to enact legislation such as that before us. The prohibition relied on is section 10, art. 8, of the constitution: "The state shall never contract any debt for works of internal improvement, or be a party in carrying on such works." That by the appropriation of money, to be expended by a state commission in certain work, the state is made "a party in carrying on such work," cannot be doubted. Indeed, that is not questioned, but only whether the construction of the proposed system of levees is a work of "internal improvement," within the meaning of this constitutional inhibition. The words themselves are capable of including substantially every act within the scope of governmental activity which changes or modifies physical conditions within the limits of the commonwealth; but, as the purpose of the constitution was to form a government (preamble), we must presume that these words were used in sufficiently limited sense to permit the accomplishment of that fundamental purpose, at least, to a reasonable extent. That some limitation of the broad meaning was intended has been recognized by all branches of the government and by the people, in the unchallenged provisions for state capitol university, schools for blind, deaf and feeble-minded, hospitals, penitentiaries, and the like, and for extensive works in improvement of the grounds appurtenant thereto. On the other hand, we cannot doubt the use of these words in a sense to exclude works which, but for the prohibition, might have been within the legitimate field of state government—works having at least some measure of public and governmental purpose—else the prohibition would have been needless.

The history of the federal and state governments during the quarter century preceding our constitutional convention seems to throw much light on the reason for the presence of this section in our constitution, and on the meaning of the words used therein. From about 1820 there had been vigorous debate and partisan difference over the propriety of a federal policy of construction of "internal improvements" within the several states, among the concrete illustrations of which

toll roads and canals were most prominent; but other facilities of commerce and navigation, such as improvements to harbors and navigable streams, were present. Several of the states (notably, New York, with its Erie Canal) had undertaken similar works (some of them with great success) in development of their resources, settlement of their territory, and promotion of prosperity for their citizens, as also even in promise of actual profit to the state treasury from operation of the land and water highways, which had come to include steam railroads. In 1835, when the state of Michigan was carved out from territory of which Wisconsin was also a part, popular sentiment was enthusiastically favorably to governmental activity in this direction, and the new state government was commanded: "Internal improvement shall be encouraged by the government of this state; and it shall be the duty of the legislature, as soon as may be, to make provision by law for ascertaining the proper objects of improvements, in relation to roads, canals, and navigable waters." Const. Mich. 1835, art. 12, § 3; American Commonwealths (Mich. Cooley), p. 280. This behest was promptly and vehemently obeyed. Very shortly thereafter the bubble hope of direct profit to the state treasury from the governmental ownership and operation of such enterprises collapsed in the blast of one of those greatest of educators in political economy,—a financial panic, and in the 10 years intervening before our own constitutional discussions, the pendulum of popular sentiment had swung to the extreme of opposition to a policy such as Michigan had first adopted. In 1846 the first constitutional convention of Wisconsin included an article as follows (Journal of Convention, p. 219): "This state shall encourage internal improvements by individuals, associations and corporations, but shall not carry on, or be a party in carrying on, any work of internal improvement;" the words "by individuals, associations and corporations" having been inserted in course of the deliberations. Though the constitution was defeated by the people, this section met with great and general approval. It was said by Mr. Estabrook to have been "as the precious jewel in the head of the toad." In the convention of 1847, which framed the present constitution, the clause from the former which directed encouragement of internal improvements by private enterprise was at first reported, but afterward dropped out, and that prohibiting the incurring of any indebtedness therefor was inserted. The debates make entirely clear, however, that the choice made was between the policy of permitting governmental construction of "internal improvements," and that of leaving them to come by private enterprise. The same choice was obvious in Michigan, when in 1850 the people reversed the policy commanded by the constitution of 1835, and adopted a prohibitory section substantially like our own. Nowhere in the discussion, however, can be found anything in denial of the desirability to the community of the existence of internal improvements.

There cannot be doubt that this quarter century of vehement discussion had produced a fairly definite conception of what had come to be was designated "internal improvements," which either the government was to undertake, or to leave to private enterprise, according as one policy or the other prevailed. We think it clear that such conception included those things which ordinarily might, in human experience, be expected to be undertaken, for profit or benefit to the property interests of private promoters, as distinguished from those other things which primarily and preponderantly merely facilitate the essential functions of government. Of course, this line of classification does not exclude possibility that the dominant characteristics of one class may be present in illustrations of the other. A toll-earning canal, which gathers spreading waters within its banks, may promote public health, as also may a drainage system undertaken for improvement of the lands of those who construct it. Improvement of the grounds of a state institution may improve access to, and enhance the value of, private property. But in each case the dominant purpose is obvious, and therefore the classification along the line of distinction above stated.

The decided cases generally in their facts support the foregoing conception and distinction, although not always stating it accurately. Thus, in Rippe v. Becker, 56 Minn. 100, 57 N. W. Rep. 331, 22 L. R. A. 857, in holding that a statute authorizing the state railway and warehouse commission to erect and run elevators infringed the constitutional provision, the court overruled a contention that it merely facilitated a legitimate police purpose of regulating the weighing and storing of grain; also that "internal improvements" meant only channels of travel and commerce. The first contention was overruled on the ground that building an elevator could have no relation to police regulation of weighing and storing grain—a position to which we should hesitate to assent. A more conclusive answer to the police-power argument would obviously have been that if the work was one of internal improvement, within the constitutional meaning, it was forbidden, although it might facilitate execution of a police power and purpose. In disposing of the latter contention (that works of internal improvement included only means of travel and transportation) the court said (Mitchell J., page 117, 53 Minn. page 336, 57 N. W. Rep. and page 857, 22 L. R. A.), that it included " 'any kind of work that is deemed important enough for the state to construct," except, of course, as indicated in Leavenworth Co. v. Miller, 7 Kan. 479, 493, 12 Am. Rep. 425, those which are used exclusively by and for the state, as a sovereign, in the performance of its governmental functions, such as a state capitol, state university, penitentiar-

ies, reformatories, asylums, quarantine buildings, and the like, for education, the prevention of crime, charity, and the preservation of public health are all recognized functions of state goverment." In other cases expression "works of internal improvements," contained in constitutional prohibitions similar to ours, have been declared to include entreprises as follows: Dredging sand flats from a river (Ryerson v. Utley, 16 Mich. 269); deepening and straightening river (Anderson v. Hill, 54 Mich. 477, 20 N. W. Rep. 549); constructing or operating street railways (Attorney General v. Pingree, 120 Mich. 550, 79 N. W. Rep. 814, 46 L. R. A. 407); telephone or telegraph lines (Northwestern Tel. Exch. Co, v. Chicago, M. & St. P. R. Co., 76 Minn. 334, 345 79 N. W. Rep. 315); irrigation reservoirs (*In re* Senate Resolution Relating to Appropriation of Moneys Belonging to Internal Imp. Fund, 12 Colo. 287, 21 Pac. Rep. 484); roads, highways, bridges, ferries, streets, sidewalks, pavements, wharves, levees, drains, waterworks, gas works (*obiter*; Leavenworth Co.. v. Miller, 7 Kan. 479, 493, 12 Am. Rep. 425); levees (Alcorn v. Hamer, 38 Miss. 652); improvement of Fox river Sloan v. State, 51 Wis. 623, 632, 8 N. W. Rep. 393); levees and drains (State v. Hastings, 11 Wis. 448, 453). It also appears by the relation in this case that the original construction of the system of levees, to which those now contemplated are to be supplementary, was done both by this state and by the United States as a work of internal improvement, and by the municipalities for reclamation and improvement of property. See chapter 213, Laws 1873; chapter 434, Laws 1889; and Barden v. City of Portage 79 Wis. 126, 132, 48 N. W. Rep. 210.

In the light of the historical situation surrounding the framing of our constitution, and of the construction, both practical and judicial, since given, we cannot doubt that, *prima facie*, levees or dikes to restrain the waters of a navigable river are works of internal improvement, within the meaning of the prohibitory section invoked by the attorney general; and that, too, whether the main purpose be promotion of navigability, creation of water power, or reclamation of adjoining lands. In any of these there is enough of pecuniary benefit to warrant belief in the possibility, at least, that they may be undertaken by private enterprise or local associations. Indeed, a part, at least, of the system which the act of 1901 proposes to construct and strengthen, was the result of the private enterprise of the Green Bay & Mississippi Canal Company, subsequently taken over by the United States. On the other hand, even though there be some slight measure of general governmental purpose likely to be accomplished by such structures, it is indirect and relatively so slight that it cannot take the work out of the category to which it so obviously belongs. Railway and toll-road building is forbidden to the state, yet each facilitates the moving of the militia and the transportation of supplies for the state institutions. Removal of dangerous rapids from a navigable river would tend to protect life yet the authorities hold it a prohibited internal improvement, no matter how fully the legislature may have been impressed with the desirability of the improvement for the life-saving purpose. For the same reason the fact that levees at the place in question might incidentally avert possible peril to life cannot make them other than works of internal improvement, nor can the declaration of such a purpose in the title of the act be any more effective to that end.

At this point the relator presents the argument that in protection of life and property, or otherwise, there may be found a public purpose in the construction of the proposed levees, whereby they are brought within the police power of the legislature. This may well be conceded *arguendo*, without changing the result. Important public and general interests may be, doubtless are, subserved by railroads, canals, street railways, and telegraphs; else the state's right of eminent domain could not be conferred in their aid. But that fact does not prevent them from being works of internal improvement, forbidden to the general state government. It is on the ground that such works do serve a public purpose, and are within the ordinary police powers conferred by the general vesting of legislative power, that it has been held that the legislature may delegate to counties and municipalities authority to aid them by loans of credit. Bushnell v. Beloit, 10 Wis. 195; Rogan v. City of Watertown, 30 Wis. 259. But that result is reached only because the prohibition contained in section 10, art. 8, of the constitution, applies only to the general state government, and not to the minor political divisions. Concede the state government has the police power, and that such works fall within it; nevertheless the state is prohibited from exercising that power by means of works of internal improvements. The police power has been wittily defined as the power to pass unconstitutional laws, and some utterances of courts have seemed to justify such conception. It is nevertheless erroneous. An act which the constitution clearly prohibits is beyond the power of the legislature, however proper it might be as a police regulation but for such prohibition. Sectarian instruction cannot be given in public schools, however promotive of public morals the legislature may deem it. State v. District Board of School Dist. No. 8, 76 Wis. 177, 44 N. W. Rep. 967, 7 L. R. A. 330, 20 Am. St. Rep. 41. No law impairing the obligation of contracts may be enacted, however essential to the peace of the community. Cornell v. Hichens, 11 Wis. 353.

The full extent to which courts may go in their construction is to recognize that constitutions are adopted for the purpose of establishing government, to which end some measure of police power is essential, and that a construction of any provision which would wholly prevent the accomplishment of that purpose is to be presumed

against, if any other reasonable one can be found which is consistent with the existence of government. It is upon this ground that this and other courts have ascribed a limited meaning to the words "internal improvements," but, after finding what that meaning is, we cannot sustain the state government in being a party to them without nullifying the behests of the sovereign people, pronounced in the highest form of written law. Being convinced, as already stated, that their true meaning is such as to include the work authorized by chapter 282, Laws 1901, we must hold that the legislature was forbidden to enact such chapter into law, and that the secretary of state is neither required nor empowered to issue warrants for expenses incurred under it.

Judgment reversed, and cause remanded, with directions to dismiss the proceedings.

NOTE.—*Right of the State to Make Internal Improvements or to Operate and Control Public Utilities.*—The cry of "public ownership of public utilities" is being heard in the land, and has become the slogan of several political parties. It is attracting universal attention, and is not regarded with the same apprehension, as formerly, by persons of conservative temperament. That the judicial mind, however, does not expand with the enthusiasm of the people is evident from decisions similar to the one rendered in the principal case.

Where there are no special constitutional objections, the right of the state to take private property or to erect improvements, and to maintain them in the interest of the people would seem to rest upon the question whether they constituted a public use or not. Both the power of eminent domain and that of taxation are involved, and both depend for their proper exercise on whether the use for which they are exercised is public or private. The term "public use," however, has become exceedingly elastic. "While the term was originally employed in the law as meaning a use by some governmental agency, the ever-increasing complications of modern civilization have compelled an application of the right of eminent domain to other than public or governmental uses; and the meaning of the term 'public use' has broadened from time to time to cover these new applications of the right, until now the term is synonymous with 'public good.'" Tiedeman on State and Federal Control, p. 692. See also Beekman v. R. R., 3 Paige (N. Y.), 45, 73. And especially is this true of real property and its improvements, for, as is stated by the same author to which we have already referred, "inasmuch as the ultimate property in lands is vested in the state for the common benefit, it is not unreasonable to claim that all private property in lands is acquired and held, subject to the condition, among others, that it may be reclaimed by the state whenever the public interests demand it." This rule would seem to give the state the right to appropriate the title to coal lands, about which there has been much discussion lately; especially where these lands all come into the hands of a tyranical monopoly who sell or refuse to sell at their pleasure.

The right of the legislature to permit a municipality to erect and maintain public improvements is well recognized. Thus, under its general police power to provide for the health and welfare of its inhabitants, a city has the right to furnish light for lighting streets, and other public purposes. Crawfordsville v. Braden, 130 Ind. 149, 30 Am. St. Rep. 1147, 14 L. R. A. 268; Heilbron v. Cuthbert, 96 Ga. 312; Hequemburg v. Dunkirk, 49 Hun (N. Y.), 550; Ellinwood v. Reedsburg, 91 Wis. 131; Mauldin v. Greenville, 33 S. Car. 1. *Contra:* Spaulding v. Peabody, 153 Mass. 129. But some authorities, who admit the right of the city to manufacture and furnish its own light, deny that any power can be implied from such right, to erect or maintain a lighting system for the purpose of supplying light to private persons or for private purposes. Christensen v. City of Fremont, 45 Neb. 160; Mauldin v. Greenville, 33 S. Car. 1; Baily v. Philadelphia, 184 Pa. St. 594, 63 Am. St. Rep. 812. But against this position it has been held that where a city has authority to grant corporations or individuals the right to erect and maintain appliances for supplying light to the inhabitants of the city, this is sufficient to warrant the city itself in so doing. Crawfordsville v. Braden, 130 Ind. 149. So also it has been held that under an express power to erect gas works or waterworks a city is not limited to furnishing gas or water for use in public places, but may furnish the same for private use. Thomson v. City of Newton, 42 Fed. Rep. 723; Smith v. City of Nashville, 88 Tenn. 464.

As to the right of a legislature to appropriate funds for this purpose the authorities are very meagre, but we cannot believe that any power which they are permitted to delegate to a municipality, they are denied the right to exercise themselves, unless as in the principal case, some definite constitutional provision prohibits it. Subject only to the requirement whether the use is a public one, the right of the legislature to appropriate the public funds is absolute. This is axiomatic in the law. Dodge v. Mission Township, 107 Fed. Rep. 827, 54 L. R. A. 242. Thus, an appropriation for a state exhibit at a world's fair or exposition is not unconstitutional, it being for the purpose of advertising the state and therefore a public use. So also an appropriation for the purpose of constructing and maintaining a state canal is for a public use. Thomas v. Leland, 24 Wend. (N. Y.) 65. In these cases this right of the legislature does not rest upon its police power, but upon its absolute power of disposal of public funds except for purposes expressly prohibited. In many states the legislature has been hampered unreasonably it seems to us, in its right to appropriate the public funds, by the prohibition of any expendifure for internal improvements. Under such a provision, of course, whatever comes within the term "internal improvements" are denied the right to receive any financial aid or assistance from the state government. The effort of the courts to distinguish between improvements which are purely governmental and those which are public, and yet not governmental, is sometimes ridiculous, but the authorities on this question are cited with sufficient exhaustiveness and accuracy by the court in the principal case. It would seem better for the people to trust their representatives in the appropriation of public moneys with the simple limitation that the use be a public one. They will then be in a position to more effectively solve some of the complex problems such as the ownership and control of public utilities, which confront our twentieth-century civilization.

ALEXANDER H. ROBBINS.

HUMORS OF THE LAW.

A news dispatch from Rochester, New York, says a "respected" lawyer of that town has sued a young woman for money expended on her entertainments. Well, such a man as that wouldn't be respected anywhere else.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. ABATEMENT AND REVIVAL—Pendency of Suit in Another Court.—The pendency of a suit in a federal court to establish a mechanic's lien, in which the court does not take possession of the property, does not affect the jurisdiction of a state court to entertain a suit to foreclose a mortgage thereon —National Foundry & Pipe Works v. Oconto City Water Supply Co., U. S. C. C. of App., Seventh Circuit, 113 Fed. Rep. 793.

2. ADMIRALTY—Maritime Contract.—An agreement by which one of the parties undertakes the responsibility of navigating a vessel on the ocean and bringing her back to her home port for a stipulated compensation is essentially a maritime contract.—The Laurel, U. S. D. C., D. Wash., 113 Fed. Rep. 373.

3. ANIMALS — Election Day Closing Saloons.—Under a city charter, held, that an election ordered by the commissioners' court to determine whether hogs, sheep, and goats should run at large within the county would be void as to the city, and could not prevent a saloon from being open on the day it was held.—Reuter v. State, Tex., 67 S. W. Rep. 505.

4. APPEAL AND ERROR—Errors of Law.—Errors of law are not waived on appeal because not complained of in the motion for new trial.—Ft. Worth & R. G. Ry. Co. v. Sivells, Tex., 67 S. W. Rep. 517.

5. APPEAL AND ERROR—Exceptions.—An exception reserved "to the court's refusal to charge such of the requests as were not charged" does not raise any point for review as to any of the charges so refused.—Kaufmann v. United States, U. S. C. C. of App., Second Circuit, 113 Fed. Rep. 919.

6. APPEAL – New Trial.—On appeal from an order granting a new trial on all of defendant's exceptions, the court cannot say that the new trial was not properly ordered, when exceptions are not in record.—Serwer v. Serwer, 75 N. Y. Supp. 842.

7. ARREST—Measure of Damages.—In an action by one discharged from civil arrest on indemnity bond, the measure of damages is payment for time lost and expenses.—Krause v. Rutherford, 75 N. Y. Supp. 773.

8. ASSAULT AND BATTERY — Indictment.—An indictment charging that defendant did unlawfully, willfully, and intentionally assault, strike, beat, and wound the prosecuting witness, by pointing a revolver at him in a rude and threatening manner, is sufficient.—State v. Lewellyn, Mo., 67 S. W. Rep. 677.

9. ASSIGNMENTS — Assent of Parties.—A contract whereby the owners of a department store let certain space therein to plaintiff for a shoe department held not assignable without the assent of both parties.—Moore v. Thompson, Mo., 67 S. W. Rep. 680.

10. ATTORNEY AND CLIENT—Contract of Employmen —Rule that burden of proof is upon attorney to show fairness of contract with his client held not to apply to contract of employment.—Clifford v. Braun, 75 N. Y. Supp. 856.

11. BANKRUPTCY — Preliminary Objection to Jurisdiction.—The objection that an attaching creditor has no standing to maintain a petition in involuntary bankruptcy may be taken by the alleged bankrupts preliminarily to prevent their examination, where they are in the custody of the court pursuant to a warrant of arrest issued under Bankr. Act, § 9b.—*In re* Schenkein, U. S. D. C., W. D. N. Y., 113 Fed. Rep. 421.

12. BANKRUPTCY — Semitontine Policy.—Trustee in bankruptcy, awarded smitontine policy on bankrupt's life as an asset, might either permit bankrupt to pay surrender value to him and convey all claim to the policy to the bankrupt, or might sell his interest therein at the date of adjudication in bankruptcy for the benefit of creditors.—*In re* Welling, U. S. C. C. of App., Seventh Circuit, 113 Fed. Rep. 189.

13. BUILDING AND LOAN ASSOCIATIONS — Coupon Dividend.—Provision in coupon to certificate of stock in building association to pay a certain amount held merely an agreement to declare a dividend for such amount, if earned.—Watson v. Columbia Mutual Building & Loan Assn., 75 N. Y. Supp. 747.

14. BUILDING AND LOAN ASSOCIATIONS — Law Governing Contracts.—Loan contracts between a building and loan association and its borrowing stockholders are governed by the local law, but the rights and obligations of the stockholders as such are governed by the general law, in the absence of statute.—Coltrane v. Blake, U. S. C. C. of App., Fourth Circuit, 113 Fed. Rep. 785.

15. BUILDING AND LOAN ASSOCIATIONS — Place of Contract.—Where plaintiff subscribed for stock in a Colorado building association, and borrowed money thereof, giving a mortgage on property in Utah, the notes to be paid in Colorado, the contract is a Colorado contract.—Kinney v. Columbia Savings & Loan Assn., U. S. C. C., D. Utah, 113 Fed. Rep. 359.

16. CARRIERS — Defective Freight Platform.—Carrier held not liable to a passenger stepping through a hole in the part of the depot platform used, to his knowledge, exclusively for freight; he having gone there on a dark night to relieve himself.—Houston, E. & W. T. Ry. Co. v. Grubbs, Tex , 67 S. W. Rep. 519.

17. CHATTEL MORTGAGES—Indiana Statute.—Under the laws of Indiana as construed by its supreme court, the fact that a chattel mortgagee verbally agrees at the time the mortgage is given that the mortgagor may sell certain of the property covered thereby for his own benefit does not invalidate the mortgage as to other property to which such agreement does not apply.—*In re* Soudan Mfg. Co., U. S. C. C. of App., Seventh Circuit 113 Fed. Rep. 804.

18. COLLISION—Overtaking Vessels.—Where an overtaking steamship is passing too close to another, so as to create danger of a collision, the latter is justified in slowing, or even in reversing, so as to shorten the time of passing, and such action cannot be charged as a fault by the overtaking vessel in case of collision.—The Aureole, U. S. C. C. of App., Third Circuit, 113 Fed. Rep. 224.

19. CONSTITUTIONAL LAW — Impairment of Obligation of Contract.—An ordinance passed by a city, under assumed authority from the state, providing for the erection of electric light works for the purpose of supplying light to its inhabitants in competition with an electric light company, in violation of the implied terms of a contract made by a prior ordinance granting a franchise to such company for a term of years, is a law impairing the obligation of contracts, within the meaning of the contract clause of the federal constitution.—Southwest Missouri Light Co. v. City of Joplin, U. S. C. C., W. D. Mo., 113 Fed. Rep. 817.

20. CONSTITUTIONAL LAW — Insurance Policies.—The practice of allowing proof of waiver of terms and conditions of an insurance policy, without alleging such waiver in the pleadings, held not repugnant to fourteenth amendment.—Andrus v. Fidelity Mut. Life Ins. Assn., Mo., 67 S. W. Rep. 582.

21. CONSTITUTIONAL LAW—Sale of Liquor to Students.—The statutes prohibiting the sale of liquor to students do not deprive citizens of their equal rights and immunities, or to deny to them the equal protection of the laws —Peacock v. Limberger, Tex., 67 S. W. Rep. 518.

22. CONTEMPT—Disobedience of Order.—Where a stay is granted until the determination of a motion, plaintiff is not in contempt for proceeding after announcement of decision on the motion, because he did not wait until a formal order was entered.—Dady v. O'Rourke, 75 N. Y. Supp. 821.

23. CONTEMPT—Proceedings.—In proceeding to adjudge one in contempt, the proper procedure is to grant a rule to show cause on affidavit or proof in open court. —*In re* Haines, N. J., 51 Atl. Rep. 929.

24. CONTRACTS—Construction a Matter of Law.—The construction of a contract in writing is a matter of law for the court, and it is immaterial at whose suggestion particular clauses were inserted.—Hull Coal & Coke Co. v. Empire Coal & Coke Co , U. S. C. C. of App., Fourth Circuit, 113 Fed. Rep. 256.

25. CONTRACT — Limiting Liability.—Contract providing that M or P shall not be liable for expenses, further than that each shall pay one-fourth thereof, held to limit liability of M to one-fourth of expenses, through P becomes insolvent and in default as to his share.—Harris v. Mercur, Pa., 51 Atl. Rep. 969.

26. CONTRACTS—What Law Governs.—Where a suit is brought on a contract made in a sister state, the *lex loci contractus* controls as to form to be observed in its creation —Roubicek v. Haddad, N. J., 51 Atl. Rep. 938.

27. CORPORATIONS—Call on Stock.—The registered owner of preferred stock of a corporation held liable to pay a call made thereon, though he made no express promise to pay.—American Alkali Co. v. Campbell, U. S C. C , E. D. Penn., 113 Fed. Rep. 398.

28 CORPORATIONS—Deed to Directors.—Where a solvent corporation sold to two of its directors, who were principal stockholders, certain real estate in consideration of such purchasers assuming corporate debts to an amount equal to the value of the property, the sale was valid as against the other creditors of the corporation. —Swentzel v. Franklin Inv. Co., Mo., 67 S. W. Rep. 596.

29. COSTS—Affidavit of Poverty.—The filing of the affidavit of poverty, under Act July 20, 1892 (27 Stat. 252), and not the truth of it, constitutes the answer to defendant's demand for security for costs, and defendant can only contest this truth by a motion to dismiss.—Woods v. Bailey, U. S. C. C., W. D. Pa., 113 Fed. Rep. 390.

30. COUNTIES—Court House.—A city may grant to a county, and the county may accept, part of a common as a location for the county court house, in exchange for the old court house site in the city.—Gumpert v. Commissioners of Luzerne County, Pa., 51 Atl. Rep. 968.

31. CRIMINAL TRIAL—Contradictory Plea.—Defendant in prosecution for burglary held entitled to contradict his previous plea of guilty to a theft of the same goods. —Murmutt v. State, Tex., 67 S. W. Rep. 508.

32. CRIMINAL TRIAL—Jury's Recommendation.—Where the jury, in finding a verdict of guilty, recommends the accused to the court's mercy, such recommendation is committed to the court's discretion.—Ray v. State, Tenn., 67 S. W. Rep. 553.

33. CRIMINAL TRIAL—New Trial.—A new trial will not be granted because the jury agreed to divide by 12 the sum of the fine and imprisonment suggested by each juror, where there was no agreement in advance to abide by the result, and where further ballots were taken before the verdict was agreed upon.—Hill v. State, Tex., 67 S. W. Rep. 506.

34. CURTESY—Life Estate.—A husband has a life estate in the separate property of his deceased wife which is acquired by another by foreclosure of deed of trust on the land given by the husband.—Stratton v. Robinson, Tex., 67 S. W. Rep. 539.

35. CURTESY—Wife's Trust Deed as Surety.—A husband cannot be compelled to pay to his children as heirs of his wife the full amount of his indebtedness secured by her trust deed, but is entitled to retain the value of his curtesy in the land conveyed by the trust deed.—Barkhoefer v. Barkhoefer, Mo., 67 S. W. Rep. 674.

36. CUSTOMS DUTIES—Additional Duties.—Under Tariff Act 1897, § 32, and the proviso thereof, that the government proceeds under proviso for a forfeiture for undervaluation in the entry held not to relieve the importer from liability for additional duties imposed by another part of the section —Gray v. United States, U. S. C. C. of App., Second Circuit, 113 Fed. Rep. 213.

37. DEATH—Measure of Damages.—In an action for the negligent killing of plaintiffs' husband and father, plaintiffs are not entitled to recover a sum equal to all the benefits that would have been received from the decedent in the future, had he not been killed.—Ft. Worth & R. G. Ry. Co v. Sivells, Tex., 67 S. W. Rep. 517.

38. DEATH—Minor Child.—An instruction, in an action by parents for the negligent killing of a minor child, that the measure of damage is the present pecuniary value of the services the child would have rendered for the parents, held not erroneous in not having limited the services to the minority of the child.—Texas & P. Ry. Co. v. Harby, Tex., 67 S. W. Rep. 541.

39. DEATH—Presumption.—Representatives of the sister of a person who disappeared in 1873, she dying in 1876, have no interest in the estate of the person disappearing.—*In re* Davenport, 75 N. Y. Supp. 934.

40. DESCENT AND DISTRIBUTION—Interest of Heir Indebted to Estate.—One buying interest of heir in land belonging to intestate's estates held not entitled to partition; the heir being insolvent and indebted to the estate in excess of his interest therein.—Ayres v. King, Mo., 67 S. W. Rep 558.

41. EMINENT DOMAIN—Contesting Condemnation Proceedings.—Under St. Louis City Charter, art. 6, § 9, the city is not liable to a property owner for attorney's fees and other expenses incurred in contesting proceedings to condemn his property, where such proceedings were dismissed by the city without having been unreasonably and vexatiously protracted.—St. Louis Brewing Assn. v. City of St. Louis, Mo., 67 S. W. Rep. 563.

42. EMINENT DOMAIN—Easement.—Where a city permanently occupied land by turning the channel of a ditch over it, the owner was entitled to the value of the land so taken under Const. art. 1, § 17.—Harrison v. City of Sulphur Springs, Tex., 67 S. W. Rep. 515.

43 EMINENT DOMAIN—Error in Assessing Damages.—Under the laws of Washington, a court of original jurisdiction has no inherent power to set aside the verdict of a jury in a condemnation proceeding for error in assessing damages, but an appeal is permitted.—United States v. Freeman, U. S. D. C., D. Wash., 113 Fed. Rep. 370.

44. EQUITY—Improper Joinder.—A demurrer to a bill which includes causes of action for unfair competition of which the court is without jurisdiction and on a patent of which the court has jurisdiction, will be sustained, unless within 10 days plaintiff dismisses the former.—Keasby & Mattison Co. v. Philip Cary Mfg. Co., U. S. C. C., S. D. N. Y., 113 Fed. Rep. 432.

45. EVIDENCE—Expert Testimony —To aid in the interpretation of a contract relative to drilling well for oil and gas, oral testimony of experts and practical producers is admissible.—Thorn Hill Oil Co. v. Ft. Pitt Gas Co., Pa., 51 Atl. Rep. 981.

46. EXECUTION—Fraudulent Conveyance. — A bill to enjoin a judgment creditor of a grantor from selling under execution realty conveyed to plaintiff, together with defendant's answer and the reply thereto, held to warrant the trial court in finding that the deed was void as against creditors.—Chamberlain v. Baker, Tex., 67 S. W. Rep. 582.

47. EXECUTORS AND ADMINISTRATORS—Compensation for Services —In an action to recover for services to defendant's testator, plaintiff, having proved the rendition of the services and the value, is not required to

prove non-payment.—Ralley v. O'Connor, 75 N. Y. Supp. 925.

48. EXECUTORS AND ADMINISTRATORS — Dismissal of Appeal.—A voluntary dismissal of an appeal to the circuit court from a judgment of the probate court approving an administrator's final settlement is no bar to a suit in equity to surcharge and falsify the settlement.—Baldwin v. Dalton, Mo., 67 S. W. Rep. 599.

49. EXECUTORS AND ADMINISTRATORS — Purchaser's Title.—One purchasing from an executor having power to sell gets good title against a beneficiary, though the executor misappropriates the proceeds; the purchaser not being bound to see to the application of the money.—Cochrane v. Newcomer, Pa., 51 Atl. Rep. 989.

50. FEDERAL COURTS—Actions Ex Relations. — A suit in the name of a state, on relation, is to be treated, for the purpose of determining the jurisdiction of a federal court, as though the relators were alone the complainants. — Jack v. Williams, U. S. C. C., D. S. Car., 113 Fed. Rep. 823.

51. FEDERAL COURTS — Receiver Appointed by State Court.—A federal court, on the principle of comity, will recognize the right of a receiver, appointed by a court of another state under a state statute to enforce the liability of a stockholder for the benefit of the creditors of an insolvent corporation, to maintain an action therein against such stockholder in his own name, where it will not violate the local policy or interfere with local creditors.—Burr v. Smith, U. S. C. C., D. Ind., 113 Fed. Rep. 858.

52. FEDERAL COURTS — Suits Against State. — The eleventh constitutional amendment does not exclude from the jurisdiction of a federal court a suit against individuals holding official positions under a state, to prevent them, under color of an unconstitutional statute, from committing by some positive act a wrong or trespass in which the plaintiff has a legal interest.—Union Pac. R. Co. v. Alexander, U. S. C. C., D. Colo., 113 Fed. Rep. 347.

53. FEDERAL COURTS—Taxing Costs.—While the federal courts, in taxing costs, are to follow the local practice, except so far as modified by statute or by special usages, they are not so far bound by it as to be embarrassed in doing justice between the parties. — Primrose v. Fenno, U. S. C. C., D. Mass., 113 Fed. Rep. 375.

54. FENCES — Breaking Down. — A person cannot be convicted of unlawfully pulling up a fence, where the alleged fence consists merely of posts set in the ground and on which the wire has not been strung. — Burch v. State, Tex., 67 S. W. Rep. 500.

55. FRAUDS, STATUTE OF — Corporations. — Written agreement of corporation buying out department store to perform contract whereby plaintiff had leased space therein held a compliance with statute of frauds. — Moore v. Thompson, Mo., 67 S. W. Rep. 680.

56. FRAUDS, STATUTE OF — Oral Contract. — Where a written memorandum is made of an oral contract of sale of real property, and the terms of the contract are afterwards changed by oral agreement of the parties, the whole thereupon becomes an oral contract.— Snow v. Nelson, U. S. C. C., D. Nev., 113 Fed. Rep. 353.

57. GUARDIAN AND WARD — Trespass to Try Title. — Confirmation of a guardian's sale cannot be questioned in trespass to try title to the property so sold.— Stroud v. Hawkins, Tex., 67 S. W. Rep. 534.

58. HOMESTEAD — Occupancy. — Where one removed from land, occupied as a homestead, and so occupied other land, but subsequently returned to the former, the same thereafter had no homestead character as against creditors whose rights were acquired while the land was unoccupied. — Rouse v. Caton, Mo., 67 S. W. Rep. 578.

59. HOMICIDE—Supplementary Dying Declarations.—Dying declarations, reduced to writing and signed, may be supplemented by other declarations made at the same time and not reduced to writing. — Herd v. State, Tex., 67 S. W. Rep. 497.

60. HUSBAND AND WIFE — Alienation of Husband's Affections.—The plaintiff, in a suit for the alienation of her husband's affections, must show, not only the loss of the husband's affections, but that they were alienated by defendant.—McKenna v. Algeo, N. J., 51 Atl. Rep. 936.

61. HUSBAND AND WIFE — Conveying Separate Property — Under Rev. St. art. 4618, empowering a married women to convey her separate real estate, by her husband joining in the deed, she being privily examined, it is immaterial that her husband is a minor.—Tippett v. Brooks, Tex., 67 S. W. Rep. 512.

62. HUSBAND AND WIFE — Easement on Wife's Property.—Where a married woman with her husband, occupied her separate property as a homestead, he could not create a permanent easement thereon by permitting the construction of a ditch over it. — Harrison v. City of Sulphur Springs, Tex., 67 S. W. Rep. 515.

63 HUSBAND AND WIFE— Shares of Stock.— Where a husband invested money of his and of his wife in shares of stock, taking the certificate in his own name, and he disposes of more than his share, held that, as against his creditors, she has only an undivided interest in those remaining.—Mathis v. Hoopes, Tex., 67 S. W. Rep. 544.

64. INJUNCTION— Restraining Order.— If an order restraining defendants and appointing a receiver, awarded before subpœna is issued, is improvident, a decree, made after hearing on application to discharge the receiver and dissolve the injunction, denying such relief, amounts to the granting of an injunction and the appointing of a receiver. — Universal Savings & Trust Co. v. Stoneburner, U. S. C. C. of App., Fourth Circuit, 113 Fed. Rep. 251.

65 INSANE PERSON—Bond for Partial Support.—Under Rev. St. 1879, § 6583, a county court may require a bond from the father of an indigent, non-resident insane person to make annual payments towards her support, as a condition of sending her to the state lunatic asylum as a county charge, and the county may recover on a bond so given, on his default. — Scotland County v. McKee, Mo., 67 S. W. Rep. 559.

66. INSANE PERSONS— Suit by Next Friend.—A suit in equity may, by special order of the court, be maintained in favor of a lunatic by his next friend, where the lunatic has not been so found and a guardian appointed.—Collins v. Toppin, N. J., 51 Atl. Rep. 933.

67. INSANITY—What Constitutes.—The rule as to what constitutes insanity, in insurance cases involving suicide, is properly applied in determining whether a person injured was insane at the time of committing an act which contributed to his death.— Koch v. Fox, 75 N. Y. Supp. 913.

68. INSURANCE — Conditions Precedent. —Under Prac. Act (2 Gen. St. p. 2554), § 126, where a pleader in an action on insurance policy avers generally the performance of conditions precedent, the opposite party must set forth the condition, the performance of which he intends to deny — Vail v. Pennsylvania Fire Ins. Co., N. J., 51 Atl. Rep. 929.

69. INTERNAL REVENUE — War Revenue Act of 1898.—Rentals received by a sugar refining corporation for the use of a wharf maintained for its own use in its business and interest received on funds deposited are part of the gross receipts of its business, subject to tax under the war revenue act of 1898. — Spreckels Sugar Refining Co. v. McClain, U. S. C. C. of App., Third Circuit, 113 Fed. Rep. 244.

70. JUDGMENT—Collateral Attack. — A judgment cannot be collaterally attacked by the parties on the ground that it is erroneous. — Bedford v. Sykes, Mo., 67 S. W. Rep. 569.

71. JUDGMENT—Liability Enforced Extraterritorially.—Authority given a receiver, appointed in a creditors' suit against an insolvent corporation and its stockholders, to maintain an action in another jurisdiction in his own name against a stockholder, who is a defendant, to enforce a judgment rendered against him,

renders the question of the right to maintain such action *res judicata* as against the defendant therein.—Burr v. Smith, U. S. C. C., D. Ind., 113 Fed. Rep. 858.

72. JURY—Examining Jurors. — Where, on a prosecution for murder, the attorney general asked a juror on his *voir dire*, in the presence of other selected jurymen, whether he had scruples against hanging a man for murder, and if he believed the law wrong, a contention that the questions were prejudicially erroneous, because of the assumption of guilt, was without merit.—Ray v. State, Tenn., 67 S. W. Rep. 553.

73. LIFE INSURANCE—Proof of Loss.—A life insurance company, which instructed as to who should make proof of the loss, held not entitled to object, in an action by such persons, that another should have been a party plaintiff.—Andrus v. Fidelity Mut. Life Ins. Assn., Mo., 67 S. W. Rep. 582.

74. LIS PENDENS — Operation and Effect. — The doctrine of *lis pendens* has no application to a case where, pending a suit to establish a lien on property, a mortgage thereon antedating such suit is foreclosed in another court, so as to affect the purchaser at the foreclosure sale. — National Foundry & Pipe Works v. Oconto City Water Supply Co., U. S. C. C. of App., Seventh Circuit, 113 Fed. Rep. 793.

75. LOGS AND LOGGING — Marking Logs. — The mere fact that a log, which reached a boom 16 years after plaintiff stalked logs, was marked as he marked such logs, held not enough to warrant finding that it was one of them.—Tozier v. Brown, Pa., 51 Atl. Rep. 998.

76. MANDAMUS—Tax to Pay Interest on Indebtedness. — In View of Rev. St. Ohio, § 2687, which authorizes a village to levy an unlimited tax for any authorized purpose, upon a vote of its electors, it is no defense to a *mandamus* to compel the application of a tax levied as required by statute to the payment of a judgment for interest on its indebtedness that the village would be left without sufficient funds for ordinary municipal purposes.—Village of Kent, v. United States, U. S. C. C. of App., Sixth Circuit, 113 Fed. Rep. 232.

77. MARRIAGE — Fraudulent Representations. — Husband, induced to marry wife by her falsely representing that she had been delivered of child, of which he was the father, held not entitled to annulment of the marrage, though she had in fact borne no child at all.—Di Lorenzo v. Di Lorenzo, 75 N. Y. Supp. 878.

78. MASTER AND SERVANT—Evidence.—Where a brakeman fell in front of a moving train, evidence of directions given by the engineer, though without authority, held competent as a circumstance showing the situation. — Erie R. Co. v. Moore, U. S. C. C. of App., Sixth Circuit, 113 Fed. Rep. 269.

79. MASTER AND SERVANT—Injunction.— To authorize injunction restraining an employee from rendering services for another, it is not necessary that his services be of such a character as to render it impossible to replace him.— Philadelphia Ball Club v. Lajoie, Pa., 51 Atl. Rep. 973.

80. MASTER AND SERVANT — Injury of Servant. — The death of a conductor on a train of a logging railroad held to have resulted without negligence of the employer, and either from a danger incident to his employment or from negligence in loading the cars, in which case he was guilty of contributory negligence.—Williams v. Northern Lumber Co., U. S. C. C. of App., D. Minn., 113 Fed. Rep. 382.

81. MASTER AND SERVANT—Loading Appliances.—It is the duty of a shipowner to keep his ship in such condition that the loading appliances may be reasonably used without being liable to catch on obstructions and endanger a gangway man handling a whip.— The Anchoria, U. S. D. C., S. D. N. Y., 113 Fed. Rep. 982.

82. MINES AND MINERALS — Option to Purchase Mine. —Where a mine owner gives an option to purchase his mines, he may withdraw such option at any time before its acceptance.—Snow v. Nelson, U. S. C. C., D. Nev., 115 Fed. Rep. 353.

83. MORTGAGES — Bankruptcy.— A mortgage given by a corporation shortly before its bankruptcy, and while insolvent, but while a going concern, for money borrowed, held valid.—*In re* Soudan Mfg. Co., U. S. C. C. of App., Seventh Circuit, 113 Fed. Rep. 804.

84. MORTGAGES —Priority of Record.—Under Rev. St. N. J. p. 2106, § 22, a party asserting priority for a mortgage recorded after the recording of a subsequent mortgage must prove that the subsequent mortgagee did not pay a valuable consideration, or that he had notice of the prior mortgage.—Coonrod v. Kelly, U. S. C. C., D. N. J., 113 Fed. Rep. 378.

85 MORTGAGES — Suit to Redeem from Sale. —A complainant, who in a previous suit had been adjudged to have no lien upon property as against defendants, held not entitled to maintain a suit to redeem from a mortgage sale under which defendants held the property.—National Foundry & Pipe Works v. Oconto City Water Supply Co., U. S. C. C. of App., Seventh Circuit, 113 Fed. Rep. 793.

86. MUNICIPAL CORPORATIONS —Annual Village Tax.—Under the statutes of Ohio, a village is required to levy an annual tax sufficient to pay the interest on its indebtedness, not exceeding the maximum limit of taxation, and to apply the amount so collected to no other purpose.—Village of Kent v. United States, U. S. C. C. of App., Sixth Circuit, 113 Fed. Rep. 232.

87. MUNICIPAL CORPORATIONS —Draining Water from House.—Defendant is not relieved from liability to a person injured by his draining water from his house over the sidewalk by evidence that in that borough it was customary to so drain water.—Brown v. White, Pa., 51 Atl. Rep. 962.

88. MUNICIPAL CORPORATIONS — Estoppel. —Proceedings as to the letting of a contract for a sewer in a city street will not be set aside on *certiorari* by the abutting landowner, who took no steps to object to the contract until the work had been completed and assessment made.—Van Wagoner v. City of Paterson, N. J., 51 Atl. Rep. 922.

89. MUNICIPAL CORPORATIONS — Icy Sidewalk. —In an action against a city for injury resulting from a fall on an icy sidewalk, improper construction of the walk not being alleged, it was proper for the court to take such question from the jury.—Womach v. City of St. Joseph Mo., 67 S. W. Rep. 588.

90. MUNICIPAL CORPORATIONS —Lighting Franchise.—An ordinance passed by a city under the statute of Missouri granting a franchise for 20 years to an electric light company held to create a contract which bound the city by implication not to enter itself into competition with the company during the term.—Southwest Missouri Light Co. v. City of Joplin, Mo., U. S. C. C., S. D. N. Y., 113 Fed. Rep. 817.

91. NEGLIGENCE — Proximate Cause. —Where plaintiff's negligence is so remote as not to be a proximate cause, defendant's failure to exercise due care to avoid the consequences of plaintiff's earlier negligence will render defendant liable.—Ward v. Maine Cent. R. Co., Me., 51 Atl. Rep. 947.

92. NEGLIGENCE — Want of Ordinary Care.— Whenever want of ordinary care contributes as a proximate cause to the injury, plaintiff cannot recover, whatever may be the degree of such negligence.—Ward v. Maine Cent. R. Co., Me., 51 Atl. Rep. 947.

93. NEW TRIAL — Verdict Resting on Inferences. —A verdict resting on inferences such as the jury are authorized to draw is generally conclusive on a motion for a new trial.—Smith v. P. Lorillard Co., N. J., 51 Atl. Rep. 928.

94. NEW TRIAL —Verdict Secured by Perjury.—A trial court is bound to set aside the verdict, which in his opinion, has been secured by perjury.—Serwer v. Serwer, 75 N. Y. Supp. 842.

95. OFFICERS —Removal of Sheriff.—The governor held to have no authority to remove a sheriff, because before the election he promised to appoint an attorney as his official counsel.—Guden v. Dike, 75 N. Y. Supp. 786.

96. OFFICES AND OFFICERS—Appointment of Election Commissioners.—The provision of Act June 19, 1899, restricting the power therein conferred upon the governor of appointing election commissioners to a choice of one of them from citizens belonging to and appointed by a committee of a particular political party, is repugnant to Const. art. 4, § 53.—State v. Washburn, Mo., 67 S. W. Rep. 592.

97. PARTNERSHIP—Parol Modification of Contract.—A parol modification of a partnership contract under seal, as to the right of a partner to interest, held to be subject to repudiation at any time, but to be executed and binding as to interest adjusted before a repudiation.—Hayne v. Sealy, 75 N. Y. Supp. 907.

98. PATENTS—Bill for Review.—After decree for complainant has been entered in a suit for infringement and affirmed on appeal, defendant will not be given leave to attack the jurisdiction by supplemental bill in the nature of a bill of review, unless want of jurisdiction is clear or fraud appears.—Bliss v. Reed, U. S. C. C., W. D. Pa., 113 Fed. Rep. 946.

99. PATENTS—Effect of Assignment by Licensor —An assignment of a patent to complainant in a suit for infringement against a licensee thereunder, in which it was adjudged that the article sold by the defendant infringed a prior patent, held not to enlarge the rights of the licensee or affect the force of the decree as between the parties.—Bradford Belting Co. v. Kisinger-Ison Co., U. S. C. C. of App., Sixth Circuit, 113 Fed. Rep. 811.

100. PATENTS—Effect of Prior Adjudication.—A circuit court will not hold itself concluded by a prior decree adjudging the validity of a patent, where it appears that before the hearing the suit had ceased to be adversary, which fact was unknown to the court.—Western Electric Co. v. Anthracite Telephone Co., U. S. C. C., W. D. Penn., 113 Fed. Rep. 834.

101. PATENTS—Estoppel.—The owner of a patent, who for a valuable consideration has granted an exclusive license thereunder, is estopped to deny that the licensee took good title to the privilege which he undertook to convey.—Seal v. Beach, U. S. C. C. of App., 113 Fed. Rep. 831.

102. PATENTS — Evidence of Invention. — Where the question of invention or patentable novelty is fairly open to doubt, the practical success of the device, with the fact that it displaced similar devices in previous use, is sufficient to turn the scale in favor of invention, and sustain the patent.—Kalamazoo Ry. Supply Co. v. Duff Mfg. Co., U. S. C. C. of App., Sixth Circuit, 113 Fed. Rep. 264.

103. PATENTS — Infringement. — While one selling a patented device for a use which would be an infringement might be liable as a participator, he would not be liable for an improper use made by the purchaser afterwards, and not contemplated in making the sale.—Cary Mfg. Co. v. Standard Metal Strap Co., U. S. C. C., S. D. N. Y., 113 Fed. Rep. 429.

104. PERJURY—Evidence. —On a prosecution for perjury at a certain trail, evidence of what other witnesses testified to on such trial is inadmissible. — Freeman v. State, Tex., 67 S. W. Rep. 499.

105. PLEADING — Counterclaim. — Where a counterclaim sought damages for the breach of one of two contracts sued on, but the evidence showed a breach of the other contract, the counterclaim was properly withheld from the jury. — Vernon v. J. W. O'Bannon Co., 75 N. Supp. 737.

106. PRINCIPAL AND AGENT — Power of Attorney.—A power of attorney is an instrument by which the authority of an attorney in fact or private attorney is set forth.—Treat v. Tolman, U. S. C. C. of App., Second Circuit, 113 Fed. Rep. 892.

107. PUBLIC LANDS—Cutting Timber. — On the trial of one accused of unlawfully cutting timber on land of the United States, evidence that about the time of the cutting defendant purchased and paid for the full quantity of similar land which he could purchase under Act June 3, 1878, is inadmissible to show that he would not intentionally commit a trespass. — Teller v. United States, U. S. C. C. of App., Eighth Circuit, 113 Fed. Rep. 273.

108. PUBLIC LANDS—Cutting Timber. — One who cuts timber on the public lands of the United States in the mistaken belief that he is authorized to do so is only liable for its value as cut, but not as manufactured. — United States v. Van Winkle, U. S. C. C. of App., Ninth Circuit, 113 Fed. Rep. 903.

109. PUBLIC LANDS — Removal of Timber.—Where a defendant's answer in suit to enjoin trespass on lands shows apparent title, and that it will sustain great loss if restrained from preparing its timber for market, the court will dissolve a temporary restraining order on defendant giving bond to account for the timber, and will direct the order vacated, unless complainant within a designated time formulate issues for trial by jury.—New Jersey & N. C. Land & Lumber Co. v. Gardner-Lacy Lumber Co., U. S. C. C., E. D. N. Car., 113 Fed. Rep. 395.

110. QUIETING TITLE—Preliminary Injunction.—Where bill is against numerous defendants with diversity of interest, some of whom do not answer, it will be taken *pro confesso*, and a restraining order continued to the hearing as to defendants not answering. — New Jersey & N. C. Land & Lumber Co. v. Gardner-Lacy Lumber Co., U. S. C. C., E. D. N. Car., 113 Fed. Rep. 395.

111. RAILROADS—Deflection from Right of Way. — Deflection of railroad from right of way held not abandonment of enterprise, working a forfeiture. — Dickson v. St. Louis & K. R. Co., Mo., 67 S. W. Rep. 642.

112. RAILROADS — Destruction of Road. — Where a receiver had taken up and sold the rails from a short line of railroad under an order of the court entered without opposition, the court cannot require the owner to buy new materials and rebuild the road, on an order by interveners, made after the sale, to lease and operate it if restored.—Jack v. Williams, U. S. C. C., D. S. Car., 113 Fed. Rep. 823.

113. RAILROADS—Liability for Lost Mail.—A railroad company, carrying mail for the government, held not liable to the addressee of a package for the loss of the same through its negligence. — German State Bank v. Minneapolis, St. P. & S. Ste. M. Ry. Co., U. S. C. C., D. Minn., 113 Fed. Rep. 414.

114 RAILROADS — Negligence. — Where a locomotive engineer is negligent in failing to see a child on the track, the exercise of due care in attempting to stop the train after the peril is discovered does not relieve the company from liability. — Texas & P. Ry. Co. v. Harby, Tex., 67 S. W. Rep. 541.

115. RAILROADS — Right of Way.—Where one who has granted a right of way to a railroad sues to set aside the deed, on the ground that a portion of the way was deflected from, and he offers in evidence the plat annexed to his deed, he may not repudiate the same in his argument. —Dickson v. St. Louis & K. R. Co., Mo., 67 S. W. Rep. 642.

116. RAILROADS — Ultra Vires. — That the act of a railroad company in building a certain spur track was *ultra vires* does not justify an entry on such track by another railroad. — Texarkana & Ft. S. Ry. Co. v. Texas & N. O. R. Co., Tex., 67 S. W. Rep. 525.

117. RECEIVERS — Carrying on Business.—Facts under which held that a receiver of a dissolved co-partnership might be granted permission to advance money for the purposes of carrying on the business. — Bernheimer v. Schmid, 75 N. Y. Supp 899.

118. RECEIVERS — Mutual Claims. — Claims against H, as receiver of the P Railroad, as part of the system at the head of which was the C Railroad, by a subsequent receiver of the P road, held reducible by claims against him as such receiver for supplies afterwards furnished him by the receivers of the C Company. — Central R. & Banking Co. v. Farmers' Loan & Trust Co., U. S. C. C., D. S. Car., 113 Fed. Rep. 405.

119. REFERENCE — Benefit Societies.—Referee ordered in action to restore member of benefit association,

where evidence as to his expulsion was conflicting.—People v. Erster Zloczower Kranken Unterstutzung Verein, 75 N. Y. Supp. 784.

120. RELEASE—Avoidanee for Fraud.—A party executing a release for a claim for personal injuries cannot avoid it, as obtained by false and fraudulent representations, unless he first returns or offers to return the money received as the consideration for its execution.—Hill v. Northern Pac. Ry. Co., U. S. C. C. of App., Ninth Circuit, 113 Fed. Rep. 914.

121. REMOVAL OF CAUSES — Nature of Controversy.—Action by trustee in bankruptcy to recover an alleged preference held removable from a state to a federal court.—Corbitt v. President, etc. of Farmers' Bank, U. S. C. C., E. D. Va., 113 Fed. Rep. 417.

122. SALES — Stipulation Qualifying Guaranties. — A provision that the usual strike clause shall mutually govern in a contract for the purchase of all the coke manufactured by the seller during a fixed period, and the latter guarantying a specified amount, held only to qualify the guaranties of the purchaser to take all the coke and the seller to furnish a fixed amount. — Hull Coal & Coke Co. v. Empire Coal & Coke Co., U. S. C. C. of App., Fourth Circuit, 113 Fed. Rep. 256.

123. SEAMEN — Injury to Service. — Loss of time, expense, and risk to cargo are matters which cannot properly be permitted to outweigh the duty of a ship to put into the nearest port to procure surgical attendance for a seaman injured in the service, where his condition is such as to render such attendance reasonably necessary to save life or limb, and there is probability that it can be procured in time.—The Iroquois, U. S. D. C., N. D. Cal., 113 Fed. Rep. 964.

124. SHIPPING—Contract to Employ Master.—One employed as a master of a vessel, who is discharged before he has entered on performance, has no lien on the vessel for his damages for such breach of contract, under either the general maritime law or 2 Ballinger's Ann. Codes & St. Wash. § 5953.—The Laurel, U. S. D. C., D. Wash., 113 Fed. Rep. 373.

125. SHIPPING—Damage to Cargo.—A ship is liable for damage to cargo resulting from negligence in stowage, or in failing to properly cover a hatch to prevent leakage, notwithstanding any stipulations to the contrary in the bills of lading; nor is it relieved from such liability by the provisions of the Harter act.—The Mississippi, U. S. D. C., S. D. N. Y., 113 Fed. Rep. 985.

126. SHIPS AND SHIPPING — Damages for Breach of Charter.—The sale of a dredge, which, with three scows, had been chartered together, after breach by the charterer, but before the expiration of the term, terminates the liability of the charterer for hire as to all the vessels.—W. H. Beard Dredging Co. v. Hughes, U. S. D. C., S. D. N. Y., 113 Fed. Rep. 680.

127. STATES — Acts of Governor. — Validity of the acts of the governor, when affecting individuals, may be passed upon judicially in action to which he is not a party.—Guden v. Dike, 75 N. Y. Supp. 786.

128. STATUTES — Construction. — Where the words of a statute are clear, and its meaning plain, these must prevail, notwithstanding the opposing opinions of officers of departments of the government as to the effect of a statute intrusted to them to enforce.—Deming v. McClaughry, U. S. C. C. of App., Eighth Circuit, 113 Fed. Rep. 639.

129. TAXATION — Constitutionality.—That part of Revenue Act, § 32, which requires the assessor to deduct the amount of corporate indebtedness from the actual value of the shares of stock, in order to determine what shall be assessed as capital stock, is unconstitutional and void.—State v. Karr, Neb., 90 N. W. Rep. 298.

130. TAXATION — Exposition Property. — The taxation necessarily resulting from a donation of property to a corporation for exposition purposes held for a public, and not a private, use.—City of Minneapolis v. Janney, Minn., 90 N. W. Rep. 312.

131 TAXATION—Life Estate Subject to Inheritence Tax.—Life estate held subject to transfer tax, though life tenant might marry and cut down her estate to one for years.—*In re* Plum's Estate, 75 N. Y. Supp. 940.

132. TAXATION—Payment Under Protest.—Where a tax is paid under protest, on a threat of levy, the taxpayer, in a suit to recover the same, held not limited to the reasons stated in his protest. — Woodmere Cemetery Assn. v. Springwells Tp., Mich., 90 N. W. Rep. 277.

133. TAXATION—Proper Exercise of the Power.—Taxation to promote the educational interests of the people, to encourage their industrial pursuits, and to foster their material and commercial interests, is a proper exercise of the powers of the state.—City of Minneapolis v. Janney, Minn., 90 N. W. Rep. 312.

134. TAXATION — Undetermined Remainder as Subject to Inheritence Tax.—Where life tenant is entitled to use principal, no transfer tax is presently taxable on the remainder.—*In re* Babcock's Estate, 75 N. Y. Supp. 926.

135. TELEGRAPHS AND TELEPHONES—Mental Anxiety.—No recovery can be had from a telegraph company, in action for mental anxiety only, owing to the company's failure to deliver a message —Western Union Tel. Co. v. Bass, Tex., 67 S. W. Rep. 515.

136. TELEGRAPHS AND TELEPHONES—Relation to Public.—A telephone company maintaining public toll stations held bound to furnish private service to a customer paying in advance, without acting as a condition that it be made whole for back rent and the cost of a reinstallation.—State v. Kinloch Tel. Co., Mo., 67 S. W. Rep. 684.

137. TOWAGE—Care Required of Tug.—A tug held liable for an injury to her tow by striking on a sunken rock in a harbor, on the ground that the master, who was not familiar with the locality, failed to take a pilot or to make proper inquiry for information. — The Mabel, S., U. S. D. C., D. Conn., 113 Fed. Rep. 971.

138. TRADE-MARKS AND TRADE-NAMES—Unfair Competition.—The fact that one employed by the owner of a patent in manufacturing the patented article subsequently obtains a patent for a similar article, which he claims to be an improvement, and engages in the manufacture and sale of such article under his own patent, affords no basis for an injunction on the ground of unfair competition. — American Coat Pad Co. v. Phœnix Pad Co., U. S. C. C. of App., Fourth Circuit, 113 Fed. Rep. 629.

139. TRESPASS — Venue. — Action for injury from removal of prisoner just after his broken leg had been set, over protest of physician, held one, not for negligence, but trespass, within Rev. St. art. 1194, prescribing venue. —Lasater v. Waites, Tex., 67 S. W. Rep. 518.

140. TRIAL — Objection to Evidence. — An objection to evidence, merely as incompetent, irrelevant, and immaterial, is properly overruled as not specific.—Rice v. Waddill, Mo., 67 S. W. Rep. 605.

141. USURY — Burden of Proof — Defendant, alleging that the contract sued on, which on its face made defendant a stockholder in and borrower of plaintiff building and loan association, was but a scheme to cover up usury, and that the contract was purely a loan, has the burden of proof.—Cotton States Bldg. Co. v. Peightal, Tex., 67 S. W. Rep. 524.

142. VENDOR AND PURCHASER—Date of Sale.—The sale of realty held concluded on the date of the contract, although the deed was not actually delivered until some time afterwards. — Cummings v. Newell, Minn., 90 N. W. Rep. 311.

143. VENDOR AND PURCHASER — Purchase by Attorney. —A purchase by an attorney at a sale under process controlled by him held valid as against any claim of the judgment defendant.—Douglass v. Blount, Tex., 67 S. W. Rep. 484.

144. WITNESSES—Evidence.—In an action to recover a balance on the books of plaintiff's testator, where defendant offered in evidence a check payable to deceased, containing a recital that it was in full settlement, defendant's offer to testify that the writing was on the check when delivered was incompetent, under Comp. Laws, § 10,212.—Blodgett v. Vogel, Mich., 90 N. W. Rep. 277.